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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 682

CONSTANT G. TUFFANELLI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEFS IN SUPPORT THEREOF.

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CONSTANT G. TUFFANELLI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Constant G. Tuffanelli, petitioner, prays that a writ of certiorari be issued by this Honorable Court to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in case No. 8037, entered by the said court on December 9, 1942, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

Opinions Below.

The trial court filed no opinion. The opinion of the Circuit Court of Appeals (R. 146-150), and an opinion of one of the Justices dissenting in part (R. 146-150) have not been published at this date.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on December 9, 1942. (R. 153.) Petitioner filed a petition for rehearing which was denied on December 28, 1942. (R. 154.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

Questions Presented.

1. Whether several defendants may be convicted in a single indictment, for substantive offenses committed by them independently of each other, where such facts do not appear in the indictment but are disclosed for the first time at the trial, by the Government's evidence.

2. Whether several defendants can be convicted of a conspiracy "to commit the offenses charged in the preceding counts of this indictment" which offenses were substantive crimes committed by them independently of each other, where such facts do not appear in the conspiracy count but are disclosed for the first time at the trial, by the Government's evidence.

3. Whether, where the foregoing misjoinder of defendants and offenses exists, the trial court should not charge the Government with the burden of clear demonstration that no prejudice has resulted to the defendants, rather than to require of the defendants that they show no prejudice was visited upon them, because of the error.

4. Whether the petitioner can be convicted of violating Section 2833 of Title 26, U. S. C. A. which makes it a crime for any person to carry on the business of a distiller without having given a bond, where the evidence discloses the seizure of a set-up still by government agents but there is

no evidence that there was any mash or materials for the manufacture of distilled spirits on the premises at the time of the seizure of the still, or at any other time and there is no evidence of the sale of any distilled spirits manufactured at, or sold or delivered at or from the said still; in other words, does the foregoing situation constitute "carrying on" of the business of a distiller?

5. Whether an illegal amendment of an indictment is not made by a trial court who withholds an indictment from a jury during its deliberation because certain counts thereof have been dismissed, but who gives to the jury written slips of paper purporting to set forth the remaining charges in the indictment, which description of the charges vary materially from the allegations of the indictment.

Statutes Involved.

The statutes involved are:

U. S. C. A., Title 18, sec. 88 (Criminal Code, sec. 37).

U. S. C. A., Title 26, sec. 2810 (Internal Revenue Code, sec. 2810a).

U. S. C. A., Title 26, sec. 2833 (Internal Revenue Code, sec. 2833a).

U. S. C. A., Title 26, sec. 1441a (Internal Revenue Code, sec. 3321a).

They appear in the appendix, p. 27.

STATEMENT OF THE CASE.

The petitioner and a number of other defendants were indicted in a presentment containing ten counts. (R. 2-10.) Prior to the trial, the Government moved to dismiss Counts 4, 6 and 9, which motion was allowed by the court.

Count 1 charged that the petitioner, Walter Bonarski, Stephen Ostrowski, Frank Ptaszynski and others (not placed on trial) did, on, to-wit: July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois, wilfully and feloniously have in their possession a still set up for the purpose of distilling alcohol, which still was not then and there registered as required by law.

Count 2 charged that the same defendants, on, to-wit: July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois, feloniously carried on the business of a distiller of alcoholic spirits without having given a bond, as required by law.

Count 3 charged that the same defendants, on, to-wit: July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois, feloniously carried on the business of a wholesale liquor dealer without having paid the special tax required by law.

Count 5 charged that the same defendants, on, to-wit: July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois, unlawfully removed 435 gallons of alcohol in respect to which a tax was then and there imposed, with intent to defraud the United States of such tax.

Count 7 charged that the same defendants, on, to-wit: May 24, 1940, at Chicago, Illinois, unlawfully removed 415 gallons of alcohol in respect of which a tax was then and there imposed, with intent to defraud the United States of such tax.

Count 8 charged that the same defendants, on, to-wit:

June 12, 1940, at Chicago, Illinois, unlawfully removed 100 gallons of alcohol in respect of which a tax was then and there imposed, with intent to defraud the United States of such tax.

Count 10 charged that the same defendants, from, to-wit: January 1, 1939 up to and including July 15, 1940, conspired with each other and with unknown persons to commit "the offenses charged against the said defendants in the preceding counts."

Previous to the retirement of the jury to consider its verdict the court ordered that Counts 1, 2 and 5 be *nolle prossed* as to Bonarski and Ostrowski and that Count 5 be *nolle prossed* as to this petitioner. (R. 115.)

The jury found the petitioner guilty as to Counts 1, 2, 3, 7, 8 and 10. They found the defendants, Bonarski and Ostrowski, guilty on Counts 3, 7, 8 and 10. (R. 113.) The Court sentenced Tuffanelli and Bonarski on the aforesaid respective Counts.

At the conclusion of the Government's case, the defendants moved the Court to instruct the jury to find them not guilty on Counts 1, 2, 3, 7 and 8 on the ground that the evidence showed a misjoinder of offenses and of defendants. (R. 86, 114.) The motion was denied on all Counts as to the defendant, Tuffanelli. (R. 86, 87.) On motion of the Government an order of *Nolle Prosequi* was entered by the Court as to the defendants, Bonarski and Ostrowski, on Counts 1 and 2, and as to the defendant, Ptaszynski, on Counts 1, 2, 7, 8 and 10.

Thereupon the defendants moved the Court to require the Government to elect upon which of the remaining Counts of the indictment it would proceed against the several defendants and as ground therefor argued that the evidence disclosed a misjoinder of offenses and a misjoinder of defendants in these several Counts; these motions of the defendants were denied and thereupon Government counsel

stated that the Government elected to proceed against Tuffanelli on Counts 1, 2, 3, 7, 8 and 10; against Bonarski and Ostrowski on Counts 3, 7, 8 and 10; and against Ptaszynski on Count 3. (R. 87.) At the conclusion of all the evidence, Count 3 was dismissed as to Ptaszynski on motion of the Government.

Thus, at the conclusion of the evidence it appears that although all defendants were charged jointly with all of the offenses, the Government confessed by its action in moving for orders of *Nolle Prosequi* that Bonarski and Ostrowski should not have been joined in Counts 1 and 2 and that Ptaszynski should not have been joined in any Count.

The Government introduced no evidence whatever that Bonarski, Ostrowski and Ptaszynski had committed the offenses described in Counts 1 and 2; the setting up of a still and engaging in the business of a distiller without giving the required bond. There was no evidence connecting Tuffanelli with the charges described in Counts 3, 7 and 8. There was no evidence connecting Bonarski with Count 8. There was no evidence connecting Ptaszynski with any of the Counts.

There was no evidence whatever to prove the allegations of Count 2 charging the defendants with carrying on the business of a distiller at 2332 West Grove Avenue, Blue Island, Illinois, without having given a bond.

The only evidence introduced with respect to this Count was the seizure of a set-up still at that address. (R. 79.) No materials of any kind were found, no finished products and no mash. No evidence of the manufacture of distilled spirits at this address, and no evidence of the sales of any distilled spirits from or at this address, was given at the trial. (R. 79.)

At the conclusion of all of the evidence the Court stated that it would not send the indictment to the jury room

and asked Government counsel to prepare certain slips apprising the jury that the petitioner is charged with violating the criminal laws as to Counts 1, 2, 3, 7, 8 and 10 and that the defendants Bonarski and Ostrowski were charged with violation of the law in Counts 3, 7, 8 and 10. Government counsel prepared and handed to the Court written slips as to Counts 1, 2 and 3, as follows:

"Count 1 charges that the defendant, Constant G. Tuffanelli, was in possession of an unregistered still set up, for the purpose of distilling alcohol. This Count is based upon the statute of the United States which imposes a penalty on every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not * * * registered.

"Section 1162, Title 26, U. S. C. A.

"Section 2810(a), Internal Revenue Laws."

"Count 2 charges that the defendant, Constant G. Tuffanelli, unlawfully carried on the business of a distiller, for the purpose of distilling alcoholic spirits, without having given bond, as required by law. This Count is based upon the statute of the United States which imposes a penalty on any person who shall carry on the business of a distiller without having given bond, as required by law, * * *.

"Section 1184, Title 26, U. S. C. A."

"Section 2833(a), Internal Revenue Laws."

"Count 3 charges that the defendants, Constant G. Tuffanelli, Stephen Ostrowski, Jr., and Walter J. Bonarski, unlawfully carried on the business of a wholesale liquor dealer without having paid the special tax, as required by law, and is based on a provision of the United States statute which provides that any person who shall carry on the business of a * * * wholesale liquor dealer * * * and wilfully fails to pay the special tax, as required by law,

"Section 1397a, U. S. C. A.

"Section 3253, Internal Revenue Laws. (R. 100-101.)"

Defendants' counsel objected to these slips on the ground that they should be in the language of the indictment; more particularly that the charges were that the petitioner did those things on July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois. Over this objection, the Court sent these slips to the jury during their deliberations. The petitioner contends that these slips constitute a material amendment of Counts 1, 2 and 3 of the indictment and, hence, voids the entire indictment.

The foregoing, counsel believe, fairly represents all the facts that should be called to this Court's attention in connection with this petition.

The Circuit Court of Appeals affirmed the judgment of the trial court as to the petitioner on the substantive counts numbered 1 and 2, and the conspiracy count numbered 10. It reversed the judgment as to the petitioner on substantive counts numbered 3, 7 and 8. It affirmed the judgment as to the defendant, Bonarski, on substantive count number 7, and the conspiracy count, number 10, and reversed the judgment as to the defendant, Bonarski, on substantive counts 3 and 8. (R. 150.) The reason for reversing the judgment on Count 3 as to both Tuffanelli and Bonarski was that there was a fatal variance between the indictment which charged the defendants with being wholesalers at 2332 West Grove Avenue, Blue Island, Illinois, whereas the evidence showed the place of business was elsewhere. (R. 146-147.) The judgment was reversed as to the petitioner on Counts 7 and 8 and, as to the defendant, Bonarski, on Count 8 because there was no evidence to justify a verdict of guilty against them on those Counts. (R. 148.)

An opinion was filed by one of the Justices of the Circuit Court of Appeals, concurring in part and dissenting in part. He favored affirmance as to the conspiracy count only; as to the substantive counts, he thought the judgment should be reversed on the ground of misjoinder. (R. 151.)

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In failing to hold that the misjoinder of defendants, when first discovered at the trial, was prejudicial error.

2. In holding that the said misjoinder of defendants was not prejudicial.

3. In failing to hold that the petitioner who was never present at the still located at 2332 West Grove Avenue, Blue Island, Illinois, and who was only associated therewith by some showing of interest therein, was not a distiller, particularly since there was no evidence that distilled spirits were manufactured on the premises, that materials for the manufacture of distilled spirits were found thereon or that sales of distilled spirits were made at or from the premises.

4. In failing to hold that the written instructions of the trial court to the jury, purporting to describe the charges in the indictment but which omitted material allegations thereof, constituted a fatal amendment of the indictment.

Reasons for Granting the Writ.

1. *The petitioner was prejudiced by the failure of the trial court to order a dismissal of the substantive grounds on the ground that the evidence disclosed that the several defendants had been indicted for substantive offenses committed by them independently of each other.*

With respect to this point, the Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the trial court, as to call for an exercise of this Court's power of supervision.

If the indictment had truthfully charged the several defendants with the crimes, for which the government respec-

tively produced, or attempted to produce, evidence, the indictment would have charged only Tuffanelli with committing the crimes set forth in Counts 1 and 2, Bonarski, Ostrowski and Ptaszynski with the crime charged in Count 3, Bonarski and Ostrowski with the crimes charged in Count 7, and Ostrowski with Count 8. But, if the government had so charged the several defendants in the indictment, it would have been subjected to the principle set forth in the case of *McElroy* v. *United States,* 164 U. S. 76, 80, 17 S. Ct. 31, 32, 41 L. Ed. 355.

The existence of this objectionable situation came to light on the trial of the case for the first time and, at the first opportunity, at the close of the government's case, defendants' counsel pointed the same out to the trial court and asked first, for a directed verdict, and second, for a rule on the government to make an election of the count or counts on which it would proceed. The motion for a directed verdict was renewed at the close of all of the evidence. (R. 98, 99.)

This particular phase of the matter has never been decided by this Court. The Circuit Court of Appeals for the 7th Circuit, in the instant case of United States *vs.* Tuffanelli, has held that this misjoinder, so discovered for the first time at the trial, is not prejudicial or reversible error. This decision is in conflict with an earlier decision on the same subject matter rendered by the same Court, the Circuit Court of Appeals for the 7th Circuit, in 1912, in the case of *Brimie* v. *United States,* 200 F. 726.

The Circuit Court of Appeals for the 3rd Circuit, in the case of *United States* v. *Perlstein,* 120 F. (2) 276, held otherwise, as did the Circuit Court of Appeals for the 8th Circuit in the case of *Coco* v. *United States,* 289 F. 33.

It therefore appears that there is a confusion of opinions in the Circuit Court of Appeals for the 7th Circuit and the instant opinion is in conflict with the opinions of

two other Circuit Courts of Appeals, and presents a question which should be settled by this Court.

2. *The petitioner was prejudiced by being joined as a conspirator in an unusual and conflicting charge of conspiracy.* Count 10 of the indictment charges the petitioner and other defendants with conspiring with each other and with unknown persons to commit "the offenses charged against the said defendants in the preceding counts."

In affirming the conviction as to the petitioner on the conspiracy count, the Circuit Court of Appeals said: "to support the verdict as to the conspiracy count, it is sufficient if it is proved that Tuffanelli and one other defendant had conspired to commit the crimes alleged in Counts 1 and 2 * * *." The trial court dismissed the charges against the other defendants as to those counts.

No association of any defendant or conspirator, named or unnamed, with Tuffanelli, and no aiding or abetting Tuffanelli by any person whomsoever, with respect to the commission of the offenses set forth in Counts 1 and 2 is disclosed by the evidence. Tuffanelli stands alone as the only person named or mentioned, at the trial, who had any connection, however remote that connection may have been, with the still seized at 2332 West Grove Avenue. If the defendants had been charged, only with conspiring to commit the crimes set forth in Counts 1 and 2, no conviction could have been obtained, since only one person was involved in those crimes, according to the evidence.

The substantive Count 3, charging the defendants with being distillers of distilled spirits was reversed because of a fatal variance and, hence, a charge of conspiring to commit that substantive offense must also fail because of the fatal variance between the allegations in the indictment and the proof.

The Circuit Court of Appeals held that there was no evi-

dence to convict the petitioner with the crimes charged in Counts 7 and 8. (R. 148.)

The question is now presented whether the petitioner could be convicted in a single Count charging a conspiracy to commit five substantive crimes where, if he were charged with five individual and separate conspiracies, each devoted to a single substantive count, he would be acquitted of each charge.

This question was decided adversely to the petitioner by the Circuit Court of Appeals for the 7th Circuit.

An important point of law of first impression, should be decided by this Court particularly since it seems that this unusual method of pleading the crime of conspiracy is becoming popular with a number of District Attorneys.

3. *There was such an absence of evidence upon which to convict the petitioner of carrying on the business of distiller of alcoholic spirits, at 2332 West Grove Avenue, Blue Island, Illinois, without having given a bond, as charged in Count 2, that the conviction of the petitioner thereof, the sentence of the trial court thereon, and the affirmance thereof by the Circuit Court of Appeals result in depriving the petitioner of his liberty without due process of law, and requires the intervention of this Court to prevent such miscarriage of justice.*

4. *The petitioner is prejudiced by an illegal amendment of the indictment by the trial court.* This point was dismissed by the Circuit Court of Appeals with the comment that it was without merit. (R. 150.) Counts 1, 2 and 3 charged the defendants, on July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois, with, respectively, possessing a set-up still, with carrying on the business of a distiller, and with carrying on the business of a wholesale liquor dealer, under such circumstances that they violated the law. The slips of paper, or *written* instructions,

of the trial court, delivered physically to the jury, purported to describe these three charges but left out the date on which the crimes were committed and the place where the same were alleged to have been committed, both of which allegations were set forth in the indictment. The Circuit Court of Appeals for the 7th Circuit, in its instant opinion, held that where an indictment specifically describes the premises on which the crime is alleged to have been committed, the description becomes a matter of substance and must be proved as alleged. (R. 147.)

If the slips of paper, or written instructions, constitute an amendment of the indictment, then a case of first impression is presented to this Court. In the case of *Ex Parte Bain,* 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849, *Naftzer* v. *U. S.* (C. C. A. 8), 200 F. 494, and *Stewart* v. *U. S.,* 12 F. (2) 524, material allegations of an indictment *were stricken on the motion* of the Government, and in each such case, the ruling of the court was held to be an illegal amendment of the indictment and in violation of the Fifth Amendment to the Constitution of the United States of America, which declares that "no person shall be held to answer * * * for an infamous crime, unless upon a presentment or indictment of a grand jury."

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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GEORGE F. CALLAGHAN,
MYER H. GLADSTONE,
Of Counsel.
January 25, 1943.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

A. Several defendants cannot be convicted in a single indictment, for offenses committed independently of each other.

McElroy v. *United States,* 164 U. S. 76, 80, 17 S. Ct. 31, 32, 41 L. Ed. 355.

Nazzaro v. *United States* (C. C. A. 10), 56 F. (2) 1026, 1027.

B. Where the foregoing facts do not appear upon the face of the indictment, but do appear on the trial from the evidence, the defendants are entitled to the same benefit as if the indictment had fairly stated the facts.

United States v. *Perlstein* (C. C. A. 3), 120 F. (2) 276, 283.

Coco v. *United States* (C. C. A. 8), 289 F. 33, 34.

Brimie v. *United States* (C. C. A. 7), 200 F. 726, 729.

C. Where the foregoing error exists, prejudice to the defendants is presumed.

McElroy v. *United States,* 164 U. S. 76, 81, 17 S. Ct. 31, 41 L. Ed. 355.

McCandless v. *United States,* 298 U. S. 342, 347, 56 S. Ct. 764, 70 L. Ed. 1205, 1209.

United States v. *Perlstein* (C. C. A. 3), 120 F. (2) 276, 283.

Miller v. *United States* (C. C. A. 10), 120 F. (2) 969, 973.

Little v. *United States* (C. C. A. 10), 73 F. (2) 861, 866, 96 A. L. R. 889.

Todd v. *United States* (C. C. A. 8), 221 F. 205, 208.

The facts concerning the misjoinder appear in the *Statement of the Case* on pages 4-8 hereof and in the *Reasons for Granting the Writ* on pages 9-11 of this Petition and, hence, will not be repeated here.

Justice C. Major, in his opinion, dissenting in part, observed: "that the Appellee does not seriously dispute that there was a misjoinder but argues that there was no prejudice." (R. 151.) This misjoinder did not appear upon the face of the indictment. If it had so appeared, it would have been subjected to the principle set forth in the cases of *McElroy* v. *United States*, 164 U. S. 76, 80, 17 S. Ct. 31, 32, 41 L. Ed. 355, and *Nazzaro* v. *United States* (C. C. A. 10), 56 F. (2) 1026, 1027, which hold that several defendants cannot be convicted in a single indictment, for offenses committed independently of each other.

The objectionable situation, however, first appeared at the trial and, at proper times, the defendants' counsel made full objections to the error.

In a strikingly similar case, *United States* v. *Perlstein* (C. C. A. 3), 120 F. (2) 276, 283, that Court observed that the prosecution was familiar with the proceedings before the grand jury, with the statements of the witnesses, with the exhibits and all the provable facts of its case against each of the defendants. The Court further there observed that because of the misleading character of the indictment and the failure of Government counsel frankly to admit his lack of any evidence against one of the defendants, the first clear picture of the situation was presented at the close of the Government's case.

What the Court said in the Perlstein case is equally true in the instant case. The *propriety* of such conduct by a District Attorney and the effect of such a misjoinder when first disclosed at the trial, have never been presented to this Court.

In the instant case, the Circuit Court of Appeals for the

Seventh Circuit disposed of the objection in the following language (R. 149-150):

> "We now consider appellants' contention that several defendants cannot be convicted in a single indictment for offenses committed by them independently of each other.
>
> "The record discloses that at the close of the evidence for the Government, on motion of the counsel for the United States, an order of *nolle prosequi* was entered as to the appellant Bonarski and defendant Ostrowski on counts 1 and 2, and as to the defendant Ptaszynski on counts 1, 2, 7, 8 and 10. Thereupon, the appellants moved the court to instruct the jury to find them not guilty on counts 1, 2, 3, 7 and 8, on the ground that the evidence showed a misjoinder of offenses and defendants. The motion was denied.
>
> "The argument is that while the indictment charged all of the defendants with a commission of all of the crimes, the evidence showed that the defendants Bonarski, Ostrowski, and Ptaszynski had nothing whatever to do with the offenses charged in counts 1 and 2; that Tuffanelli had no connection with the charge described in counts 3, 7 and 8; and that there was no evidence connecting Bonarski with count 8, nor any connecting Ptaszynski with any of the counts.
>
> "In support of this contention the appellants rely upon *McElroy* v. *United States*, 164 U. S. 76, in which the court said that 'joinder cannot be sustained where the parties are not the same and where the offenses are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them.' An analysis of the McElroy case discloses that the offenses charged against the six defendants were wholly different, having no relation to each other. They included assault with intent to kill two different persons and arson of two different dwellings, each by a different combination of defendants. It is clearly distinguishable from the instant case.
>
> "District attorneys, in drafting indictments, ought to keep in mind the admonition of the courts that it is not good practice to join in an indictment counts

charging distinct offenses against separate defendants, *Todd* v. *United States, supra;* and *Culjak* v. *United States,* 53 F. (2d) 554, and while we do not approve the practice followed in this case, we cannnot say the action of the court in overruling appellants' motion may be assigned as prejudicial error, since all of the counts charged closely related offenses, based upon a series of transactions constituting a preconceived system and plan to defraud the United States of the revenue imposed on distilled liquor."

For the sake of brevity, counsel for the petitioner adopt as their answer to the foregoing, the reply of Justice C. Major in his partial dissenting opinion. (R. 151, 152.) Counsel for the petitioner cannot improve thereon.

The following cases sustain, both the position of the petitioner and of the Justice who wrote the dissenting opinion:

United States v. *Perlstein* (C. C. A. 3), 120 F. (2) 276, 283.

Coco v. *United States* (C. C. A. 8), 289 F. 33, 34.

Brimie v. *United States* (C. C. A. 7), 200 F. 726, 729.

An unusual and confusing situation now exists in the Seventh Circuit. The instant decision holds that a misjoinder under the foregoing circumstances is neither erroneous nor prejudicial; this decision is in direct conflict with an earlier decision of the same Circuit Court of Appeals, the case of *Brimie* v. *United States,* 200 F. 726.

The prejudice to the petitioner and other defendants is, however, startlingly *manifest.* The jurors were so confused by the misjoinder and the prejudicial evidence introduced on all of the counts of the indictment, that they found the petitioner guilty on Counts 1, 2, 3, 7, 8 and 10; they found the defendant Bonarski guilty on Counts 3, 7, 8 and 10; they found the defendant Ostrowski guilty on Counts 3, 7, 8 and 10. The Circuit Court of Appeals was required

to reverse the judgment against the petitioner as to Counts 3, 7 and 8; as to Count 3 because of a fatal variance and as to 7 and 8 because there was no evidence to connect him therewith; the judgment against Bonarski was reversed as to Counts 3 and 8 for the same reasons. The Circuit Court of Appeals was compelled to make such decision, only as a result of the joinder of charges committed by certain defendants independently of each other.

If it were not for the misjoinder, Tuffanelli would never have been convicted of having committed the offense described in Count 2, which charged the defendants with carrying on the business of a distiller at 2332 West Grove Avenue. Only a set-up still was found at that address. No other property was found on the premises nor any other activity was shown in connection therewith. Even the Circuit Court of Appeals observed: "The record also discloses that investigators seized an illicit distillery at 2332 West Grove Avenue, on July 12, 1940, set for operation *but not running at that time.*" (R. 148.) It is safe to say that the petitioner would never have been convicted of Count 2 except for the confusion of the jurors resulting from the misjoinder complained of.

Tuffanelli was obviously prejudiced in his defense of the charge against him set forth in Count 1, that he possessed a set-up still at 2332 West Grove Avenue, Blue Island, Illinois. Except for one additional fact, the opinion of the Circuit Court of Appeals relates the substantial evidence in connection with Count 1 (R. 148):

> "The record also discloses that investigators seized an illicit distillery at 2332 West Grove Avenue on July 12, 1940, set for operation but not running at that time. It further discloses that one Bender, a water meter reader for the city of Blue Island, read the water meter on June 7, 1940, and found, in addition to the pipe leading into the yard at the premises, another pipe leading into a building in the rear. One June 8th Bender returned, and removed the connection that sup-

> plied the rear building with water. As he was leaving the premises he met Tuffanelli who said: 'Well, I saw you down at the meter pit, we have to have water back there in the building,' and added 'there was something in the building would spoil.' Tuffanelli also inquired of Bender if he had learned to take money yet. July 13th, after the still had been seized, Bender called at Tuffanelli's home for the purpose of reading Tuffanelli's meter, and while there, Tuffanelli said to Bender: 'Something happened yesterday, there will be an investigation, don't say anything.' "

Petitioner introduced a written document, the actual meter reading at Tuffanelli's home, written by the witness Bender (Defendants' Exhibit 3, R. 98), which shows conclusively that Bender read the meter in Tuffanelli's home on July 2, 1940, and not on July 13th.

The witness's meeting with Tuffanelli on June 8th, was contradicted by defendants' witness, Joseph DeSanto. (R. 96-97.)

If the petitioner had been tried alone on that one Count, as he should have been, he could have argued and questioned quite effectively the credibility of the Government witness, Bender, particularly where an important portion of his testimony is contradicted by his own, official, written entries, made at a time long before he ever knew that he would be called as a witness in this case.

The only evidence introduced by the Government to prove that the petitioner possessed this still is merely an interest displayed by the petitioner therein; such connection with the still is so weak that it easily falls within the doctrine announced by this Court in the case of *United States* v. *Falcone*, 311 U. S. 205, 210, 61 S. Ct. 204, 85 L. Ed. 128, 132. The verdict of guilty against Tuffanelli on this Count could only have been caused by the confusion of the jury in being compelled to deliberate on the guilt or innocence of a number of defendants accused of independent and separate crimes.

It is manifest that *actual* prejudice resulted to the petitioner from the foregoing misjoinder of offenses.

II.

The Error of Joining Several Defendants in a Single Indictment, for Offenses Committed Independently of Each Other, Cannot Be Corrected by Charging Them With Conspiring to Commit Those Substantive Offenses.

The argument under the foregoing Point heading, applies with equal force to the objection here noted.

For the sake of brevity, counsel for the petitioner add hereto, by reference, that portion of the *"Reasons for Granting the Writ"* appearing on pages 11-12 of this Petition entitled *"The petitioner was prejudiced by being joined as a conspirator in an unusual and confusing charge of conspiracy."*

III.

There Was No Evidence to Prove That the Petitioner Carried on the Business of a Distiller of Alcoholic Spirits, at 2332 West Grove Avenue, Blue Island, Illinois, Without Having Given a Bond.

The charge against the petitioner of carrying on the business of a distiller at 2332 West Grove Avenue appears in Count 2. The only evidence to support that charge was the seizure of a set-up still at that address. No materials going into the manufacture of alcoholic spirits were found on the premises. There was no proof of the manufacture of distilled spirits at those premises; there was no proof that any alcohol was ever sold at or from the said premises; no distilled spirits or mash was found on the premises. Under such circumstances was there a "carrying on" of the business of a distiller at that address by the petitioner? And should the petitioner have been convicted of carrying on

the business of a distiller at that address when the only evidence to connect him with the still or the business was merely a display of some concern about shutting off water from the still building?

A decision involving facts closest to the ones under discussion is that of *Gillman* v. *State,* 55 Ala. 248, 250, which held that the phrase of "carrying on" as used in a statute imposing a license tax on any person "engaging in, or carrying on, the business of keeping a theater" means an *actual use* or management of a theater, and hence one who had a hall which he intended to use as a theater, but in which no performance had ever been given, was not within the statute.

The conviction of the petitioner of the crime described in Count 2, without any evidence whatsoever to prove the charge, results in depriving the petitioner of his liberty without due process of law.

In the case of *Mooney* v. *Holohan,* 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406, this Court held:

> "That the 'known use' by a prosecuting attorney of perjured testimony to obtain a conviction constituted a deprivation of liberty without due process of law."

Certainly, it is equally abhorrent for a defense to be convicted of a charge *without any evidence whatever* to support the same.

IV.

The Circuit Court of Appeals Erred in Affirming the Action of the Trial Court in Amending the Indictment by Sending to the Jury Papers Purporting to Describe the Charges in the Indictment But Which Papers Omitted Material Allegations Thereof.

Count 1 of the indictment accused the petitioner and others with having in their possession, on July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois, a still set

up for the purpose of distilling alcohol, which still was not then and there registered as required by law. (R. 2.)

Count 2 charged them with carrying on the business of a distiller of alcoholic spirits without having given a bond as required by law, on July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois. (R. 3.)

Count 3 charged them with carrying on the business of a wholesale liquor dealer without having paid the special tax required by law, on July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois. (R. 3.)

The Trial Court sent to the jury certain documents describing the charges in Counts 1, 2, and 3, prepared by Government counsel. These read respectively:

> "Count 1 charges that the defendant, Constant G. Tuffanelli, was in possession of an unregistered still set up, for the purpose of distilling alcohol." (R. 100.)

(The conclusion of this document referred to the statute involved and is omitted here and in the following documents.)

> "Count 2 charges that the defendant, Constant G. Tuffanelli, unlawfully carried on the business of distiller, for the purpose of distilling alcoholic spirits, without having given bond, as required by law." (R. 101.)
>
> "Count 3 charges that the defendants, Constant G. Tuffanelli, Stephen Ostrowski, Jr., and Walter J. Bonarski, unlawfully carried on the business of a wholesale liquor dealer without having paid the special tax, as required by law." (R. 101.)

Before sending these papers to the jury, the Trial Court said to the jurors:

> "For your convenience, I have set out tersely and summarized what the different counts in the indictment charge and they will go to your jury room." (R. 110, 111.)

These papers were intended to substitute for the indictment and omitted, in each instance, the place, 2332 West

Grove Avenue, Blue Island, Illinois, where *the indictment* charges the offenses to have occurred.

This allegation was a material part of the indictment; having been set forth therein, the description was a matter of substance and must be proved as alleged. The Circuit Court of Appeals so held in reversing the judgment as to Count 3, because of the variance between the address alleged therein and the proof. In commenting on the proof as to this Count the Court of Appeals observed:

> "The Government proved that on April 13 and May 16, 1940, the appellants sold untaxpaid alcohol, but there was no evidence indicating where the particular liquor came from." (R. 146, 147.)

Nevertheless the jury found the petitioner guilty on Count 3, and it must be definitely assumed that they did so because the Trial Court's amendment of Count 3 permitted them to find that the petitioner carried on the business of a wholesale liquor dealer *anywhere*, rather than at 2332 Grove Avenue.

So, too, with Count 2. Only a still was found at 2332 Grove Avenue; no sale was shown to have been made there; no spirits were proved to have been manufactured there; no materials going into alcohol or mash was found there. Indeed, there is no proof of "carrying on" of the business of a distiller at that address, in the record.

But there was abundant proof of the activities of Bonarski and Ostrowski at the garage at the rear of 12948 Western Avenue. (R. 43.) A number of sales of alcohol were shown to have been made by them, with which Tuffanelli had no connection whatever. (The Court of Appeals reversed the judgment as to the petitioner on Counts 7 and 8.) (R. 148.)

Again it may be assumed that the Trial Court's description of Count 2 permitted the jury to conclude that the business of distiller was carried on at 12948 Western Avenue.

Only a grand jury, by the terms of the fifth amendment to the Constitution of the United States, may indict a person. That indictment cannot be changed by any person.

In *ex parte Bain,* 121 U. S. 1, this Court condemned the action of the Trial Court in striking certain words from an indictment in this language:

> "The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument."

In the Bain case the judgment was held void, after conviction, in *habeas corpus* proceedings.

In the case of *Stewart* v. *United States,* 12 F. (2d) 524 (C. C. A. 9th), *by consent of counsel* for all parties, the Court struck from the body of two Counts of the indictment, as surplusage, the words "feloniously and" in one place and the words "and feloniously" in another place. The Court, after analyzing the case of *ex parte* Bain stated at page 525:

> "* * * no authority exists in a court to amend any part of the body of an indictment, without reassembling the grand jury, unless by virtue of statute."

In the case of *Dodge* v. *United States,* 258 F. 300, 7 A. L. R. 1510, counsel for the Government, at the close of the case moved to strike certain words from the indictment. *Counsel for the defendant at once said: "No objection."* The Court, thereupon struck the requested words. The Circuit Court of Appeals observed: "That it was error of the most serious kind is not to be doubted."

To the same effect is the case of *Naftzer* v. *United States,* (C. C. A. 8th), 200 F. 494, 497.

The petitioner was not tried upon the indictment returned by a grand jury; the Trial Court's action so amended it, that the jury was not confined any longer to the allegations therein. Such action voided all the pro-

ceedings in, and the judgment of, the Trial Court. It deprived the petitioner of the right assured him by the Sixth Amendment that he be tried on an indictment returned by a grand jury.

Respectfully submitted,

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APPENDIX.

U. S. C. A., Title 26, Section 2810; (Internal Revenue Code, Sec. 2810a). *Registry of stills:* (a) Requirement. Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus, is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector, and the other transmitted by him to the Commissioner. Stills and distilling apparatus shall be registered immediately upon their being set up.

Every still or distilling apparatus not so registered, together with all personal property in the possession or custody, or under the control of such persons, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited.

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years.

U. S. C. A., Title 26, Section 2833; (Internal Revenue Code, Sec. 2833a). *Distilling without giving bond:* (a) Penalty and forfeiture. Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the

business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such persons, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person, who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

U. S. C. A., Title 26, Section 3253; (Internal Revenue Code, Sec. 3253). *Penalties and forfeitures on nonpayment of special tax:* Any person who shall carry on the business of a brewer, rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, or manufacturer of stills, and wilfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years.

U. S. C. A., Title 26, Section 3331. *Removal or concealment with intent to defraud the revenue.* (a) Penalty. Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000 or be imprisoned for not more than 3 years, or both.

U. S. C. A., Title 18, sec. 88 (Criminal Code, sec. 37): *Conspiring to commit offense against United States.* If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 682

CONSTANT G. TUFFANELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority opinion in the circuit court of appeals (R. 146–150) and the opinion of Circuit Judge Major dissenting in part (R. 151–152) are reported at 131 F. (2d) 890.

JURISDICTION

The judgment of the circuit court of appeals was entered December 9, 1942 (R. 153), and a petition for rehearing was denied December 28, 1942 (R. 154). The petition for a writ of certiorari was filed January 29, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February

13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was misjoinder of offenses and of parties defendant.

2. Whether there was sufficient evidence to support petitioner's conviction of carrying on the business of a distiller without having given a bond, as alleged in count two of the indictment.

3. Whether, in view of the fact that several of the counts of the indictment had been *nolle prossed,* the trial court erred in providing the jury with summaries of the counts submitted to them instead of giving the jury the indictment itself.

STATUTES INVOLVED

Section 2810 of the Internal Revenue Code (26 U. S. C. 2810) provides in part:

> Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is * * *. Stills and distilling apparatus shall be registered immediately upon their being set up.
>
> * * * * *
>
> And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100,

> nor more than $1,000, and imprisoned for not less than one month, nor more than two years.
>
> * * * * *

Section 2833 of the Internal Revenue Code (26 U. S. C. 2833) reads:

> Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *
>
> * * * * *

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioner was tried in the District Court for the Northern District of Illinois together with Bonarski, Ostrowski, and Ptaszynski on an indictment in ten counts (R. 2–10). The first count charged that they possessed an unregistered still

at a stated address (R. 2); the second, that they carried on the business of a distiller at that address without giving bond (R. 3); and the third, that at the same place they carried on the business of a wholesale liquor dealer without paying the tax (R. 3).

The fifth, seventh, and eighth counts[1] charged that the defendants on specified occasions removed alcohol with intent to defraud the United States of taxes (R. 4, 5).

The tenth count charged a conspiracy to commit the offenses alleged in the earlier counts (R. 6–10).

The pertinent parts of the evidence may be summarized as follows:

Petitioner was the ringleader of a group engaged in the manufacture, sale, and distribution of non-tax-paid liquor in and around Blue Island, Illinois (R. 16, 19, 20, 24, 28). He was introduced to an agent of the Alcohol Tax Unit, Joseph R. Mastrandrea, by one John Perigo, an informer and former bootlegger who stated that he and Mastrandrea were partners and that Mastrandrea was a former "moonshiner" and prospective customer for alcohol (R. 14, 21, 23, 24, 26). Perigo told petitioner that he wished "to go back into the liquor business" and asked petitioner if he could sell him some liquor (R. 14, 21). Petitioner replied that because of the pres-

[1] The fourth, sixth, and ninth counts were *nolle prossed* prior to the trial (R. 11–12).

sure resulting from an anti-liquor drive by Government agents he was not in the "business" any longer but that he knew of a "young fellow" who "has a small plant and is looking for customers right now" (R. 14, 24). Petitioner then told Mastrandrea that the price would be $11.50 per five-gallon can and designated a time and place at which Mastrandrea should meet him to obtain the alcohol (R. 15). When they met on April 16, 1940, petitioner introduced Mastrandrea and Perigo to the defendant Bonarski, who took Mastrandrea's car (R. 15–16). While waiting for Bonarski to return, petitioner told Mastrandrea that he was busy at the time running a cola business, "but as soon as it can run by itself, I can run the alcohol business myself; that is the reason I am having Wally [Bonarski] do it now." When Bonarski returned, Mastrandrea asked petitioner whom he was to pay and was told to pay Bonarski. Mastrandrea also asked petitioner the degree of proof of the alcohol and was told it would be about 186 or 187 and that if Bonarski failed to treat him "right" or the alcohol wasn't as represented "you come to me and I will make it right." After Mastrandrea had left in his car he examined it and found eight five-gallon cans of alcohol. (R. 16.)[2]

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[2] This procedure of exchanging cars with the purchaser was apparently the usual method employed by the ring in effecting sales (See R. 31–32, 47–50, 52, 54, 65–66, 68, 70–71).

A few days later Mastrandrea and Perigo went to petitioner's home and there saw Bonarski, who told them that the still had broken down. Mastrandrea insisted that he needed alcohol and arranged to meet Bonarski again. (R. 16–17.) At this later meeting Bonarski said that he had been unable to get any alcohol because of the pressure of the Government's anti-liquor drive (R. 17, 27).[3]

On a subsequent occasion Bonarski introduced the agents to the defendant Ostrowski with the statement, "You will be getting stuff from him when I am not around" (R. 18; see also R. 27). Several days later the agents contacted Bonarski and arranged another purchase of alcohol. When they met on May 6, 1940, at the appointed place, Bonarski took the agents' car and Ostrowski drove the agents around in his car for about 15 minutes. Ostrowski told the agents that he "and Wally and Babe [petitioner—R. 25] are all in together, it is all one outfit," and that "Babe is the boss." (R. 19; see also R. 28.) When Bonarski returned he was paid by the agents, who took their car and upon examination found that it contained 15 cans of alcohol (*ibid.*).

At a later date the agents complained to Bonarski that the proof of the alcohol was not satisfactory and told him they were going to take it up with petitioner. Bonarski said that it was "all

[3] On this and subsequent occasions Mastrandrea was accompanied by Nicholas P. Mauro, another disguised agent of the Alcohol Tax Unit (R. 17, 26–31).

right" with him. When the agents complained to petitioner at the latter's home, petitioner replied, "If it is supposed to be 188, you ought to have 188 proof. * * * Fix it up with Walter, he will be here soon." (R. 20; see also R. 28–29.) Bonarski came in and the matter was adjusted by promising the agents one free can on their next purchase (R. 20, 29).

Petitioner owned a Studebaker coupe which he had purchased under the alias of Stern (R. 55–59). On many occasions this car was seen being driven by either Bonarski or Ostrowski, and it was used frequently in the exchange of cars while alcohol was being loaded into the purchaser's automobile (R. 41, 42, 48, 50, 51, 66, 67, 69, 70, 74). On one occasion Bonarski was seen running from a building with Government agents in hot pursuit. He jumped into petitioner's car, which was driven by Ostrowski, and rode away at a high rate of speed. (R. 51, 67, 70, 74.) Approximately thirty minutes later petitioner and Bonarski were seen together in Bonarski's car (R. 51, 70).

An Alcohol Tax Unit Agent testified that on July 12, 1940, he and other agents entered a building on the rear of the lot at 2332 West Grove Avenue, Blue Island, Illinois, and found a complete continuous process type still. There were also four wooden mash vats, each with a capacity of about 6,700 gallons. It was estimated that the still was capable of manufacturing 1,800 gallons of 100 proof alcohol per day. (R. 79.) Although

no one was in the building at the time and the agents found no materials, mash, or alcohol, "There was just the smell they had been there" and spilled sugar was found. In addition, "The still was set up for operation. You could light the oil burner, supply the mash and she was ready to go." (R. 79–80.)

One Raymond Bender, a water meter reader, testified that on June 7, 1940, he went to read the meter in a pit in front of the premises at 2332 Grove Avenue. At that time the water was turned on into a lumber yard at that address. Bender found a pipe running to the building at the rear, and he shut off the water running into the building. He returned the next day and took out the connection that supplied the building. At that time he saw petitioner, who asked him if he "had learned to take money yet." Bender replied, "No," and petitioner stated, " 'Well, I saw you down at the meter pit, we have to have water back there in the building' * * * there was something in the building would spoil." (R. 75–76.) On July 13, 1940, the day after the seizure of the still at 2332 Grove Avenue, Bender was reading meters in the neighborhood of petitioner's home in another part of the city. When he entered petitioner's home, petitioner said to him, "Something happened yesterday, there will be an investigation, don't say anything." (*Ibid.;* see also R. 81–83.)

Petitioner did not raise any question concerning the joinder of defendants and offenses prior to

the trial, but at the close of the Government's case and again at the close of all the evidence petitioner moved for a directed verdict on that ground (R. 86, 98–99, 114–115, 116–117). The motions were denied (R. 87, 98–99, 115). The case went to the jury against petitioner on counts 1 and 2 (possession and operation of the still), count 3 (doing a wholesale liquor business), counts 7 and 8 (removals of alcohol), and count 10 (the conspiracy count). Against Bonarski and Ostrowski the case was submitted upon those same counts except that counts 1 and 2 (charging possession and operation of the still) were dropped. (R. 86–87, 111.)[4] The jury returned verdicts of guilty on the foregoing counts (R. 117–118). Petitioner was sentenced to imprisonment for three years and three days (R. 128).

Petitioner and Bonarski alone appealed. The circuit court of appeals reversed the judgments as to count 3 because there was no proof that the wholesale business was carried on at the place charged in the indictment (R. 146–147). It also reversed the judgment against petitioner on counts 7 and 8 and the judgment against Bonarski on count 8 on the ground that the evidence was insufficient (R. 148). The result is that on the substantive counts petitioner stands convicted of

[4] Count 5 was *nolle prossed* as to all the defendants prior to the close of the Government's case (R. 81) and the remaining counts were *nolle prossed* as to individual defendants at subsequent stages of the trial (R. 86–87, 99, 115).

possessing and operating the still and Bonarski of removing alcohol to evade the tax, and on the conspiracy count, both stand convicted of conspiring to commit one or more of the crimes charged in the substantive counts.

ARGUMENT

I

No question for further review is presented by petitioner's contention (Pet. 9–12, 14–20) that there was a misjoinder of offenses and defendants. As pointed out in *United States* v. *Perlstein,* 120 F. (2d) 276, 281 (C. C. A. 3), upon which petitioner relies, the issue turns upon "a choice between the economy of a single trial of issues which are closely related, on the one hand, and the safeguarding of the defendant from the possibility of prejudice arising from the multiple charges on the other hand," and consequently the trial court has a wide discretion upon the facts of the particular case. Cf. *Pointer* v. *United States,* 151 U. S. 396.

In the instant case the joinder was clearly proper.[5] The substantive offenses charged were all offenses against alcohol tax laws; and the in-

[5] See *Adams* v. *United States,* 128 F. (2d) 820, 821–822 (C. C. A. 5), certiorari denied, October 12, 1942, No. 313; *Jordan* v. *United States,* 120 F. (2d) 65, 66 (C. C. A. 5), certiorari denied, 314 U. S. 608; *United States* v. *Kelley,* 105 F. (2d) 912, 916–917 (C. C. A. 2); *Culjak* v. *United States,* 53 F. (2d) 554 (C. C. A. 9); *Todd* v. *United States,* 48 F. (2d) 530, 531–532 (C. C. A. 5).

dictment charged and the evidence showed that the defendants had joined in an illegal conspiracy to violate those laws. Therefore, the substantive offenses were not, as the dissenting judge thought, "related only in that they were violations of the Revenue Act" (R. 151). They were related transactions arising out of the conspiracy and were part of the single illegal enterprise upon which the defendants had embarked.

The fact that there was this common enterprise, even though different defendants may have committed different specific criminal acts, distinguishes the instant case from the cases on which petitioner relies—*McElroy* v. *United States,* 164 U. S. 76; *Coco* v. *United States,* 289 Fed. 33 (C. C. A. 8); and *Brimie* v. *United States,* 200 Fed. 726 (C. C. A. 7). In the *McElroy* case this Court emphasized (p. 79) that there was no connection between the acts charged in the four indictments tried together and no showing of any conspiracy among the defendants. Likewise in both the *Coco* and the *Brimie* cases the crimes and defendants joined were in fact utterly disassociated one from another. Hence, the alleged conflict of decisions (Pet. 10) does not exist.[4]

The further contention that there was a misjoinder of defendants in the conspiracy count (Pet. 11–12, 20) falls with the contention last discussed. Furthermore, the argument rests wholly

[4] Contrary to petitioner's statement, the joinder was not held improper in *United States* v. *Perlstein,* 190 F. (2d) 270 (C. C. A. 3).

upon an unsound premise. Petitioner argues that he could not be guilty of conspiring with another defendant to commit one of the substantive crimes because no other defendant was found guilty on counts 1 and 2, the only substantive counts on which petitioner's conviction was sustained. But of course it was not necessary to show that two defendants had committed the same substantive crime in order to convict them of the conspiracy. It was sufficient to prove that petitioner and a co-defendant agreed to commit any one of the offenses and that one of them did an overt act.[7] Thus, the jury might have found that petitioner and Bonarski conspired to possess and operate the still (counts 1 and 2) or to remove alcohol to evade taxes (count 7) and that one of them did an overt act alleged; and this would have been sufficient although only one of them went further and committed a substantive crime.[8]

II

Petitioner's contention (Pet. 12, 20–21) that the evidence was insufficient to sustain his conviction of carrying on the business of a distiller as alleged in count 2, is without merit. The evidence, sum-

[7] *United States* v. *Rabinowich*, 238 U. S. 78, 86; *Brock* v. *Hudspeth*, 111 F. (2d) 447, 448 (C. C. A. 10); *Schefano* v. *United States*, 84 F. (2d) 513, 515 (C. C. A. 5).

[8] Moreover, petitioner was not prejudiced by the joinder either of counts or defendants (see *Dolan* v. *United States*, 133 Fed. 440, 446 (C. C. A. 8)) and his argument (Pet. 18–19) that but for it he would not have been convicted on counts 1 and 2 is based upon sheer speculation (see pp. 4–8, *supra*).

marized in the Statement, pp. 4–8, *supra,* proved beyond question that a still was being operated at 2332 Grove Street and that petitioner was the "boss" of the illicit enterprise.

III

At the conclusion of the trial, and before the judge had instructed the jury, he requested the prosecutor to prepare summaries of the counts on which the case was to go to the jury. The purpose was to give the jury the summaries and thus to avoid any prejudice to the defendants which might result from giving the jury, in accordance with the usual practice, the indictment itself, including the counts which had been *nolle prossed.* Petitioner objected only to the summaries of counts 1, 2, and 3 on the ground that they did not state the date and place at which the offense was alleged to have been committed; his objection was overruled and the summaries were submitted to the jury. (R. 100–103.)

Petitioner now contends (Pet. 12–13, 21–25) that this constituted an improper amendment of counts 1 and 2 because the summations of those counts omitted any reference to date and place.[9] The contention is untenable. The procedure adopted was to petitioner's advantage for it withheld from the jury the counts which had been *nolle prossed* and thus precluded any possibility

[9] Petitioner's objection also went to count 3, but as we have seen (*supra,* p. 9), the court below reversed the conviction on that count.

that the jury might be influenced by having those counts before them. Moreover, the omission of the date and place of the alleged offenses was supplied in the instructions to the jury; the judge specifically stated that counts 1, 2, and 3 charged that the offenses were committed "at 2332 Grove Avenue" on "July 12, 1940" (R. 106), and that the burden was upon the Government to prove beyond a reasonable doubt every allegation of each of these counts, including the allegations as to time and place (R. 106–107).[10]

CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or question of general importance. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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[10] The cases cited by petitioner (Pet. 13, 24) in support of this contention deal with *amendment* of an indictment and are therefore inapplicable. The counts in question were not altered in any respect. Cf. *Ralston* v. *Cox*, 123 F. (2d) 196 (C. C. A. 5), certiorari denied, 315 U. S. 796.

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